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No. 10-772

IN THE

Supreme Court of the United States

CITY OF HAZLETON, PENNSYLVANIA,

Petitioner,

—v.—

PEDRO LOZANO, *ET AL.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE STATEMENT

None of the respondents is a corporation that has issued shares to the public, nor is any a parent corporation, a subsidiary, or affiliate of corporations that have done so.

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INTRODUCTION

This case is a challenge to Hazleton, Pennsylvania's municipal ordinances regulating immigrant employment and housing. After four months of discovery and a nine day bench trial, the district court found the ordinances invalid in their entireties and issued a permanent injunction. The court of appeals affirmed the injunction in virtually all respects, separately addressing the employment and housing provisions and finding both sets of provisions preempted.[1] Hazleton's petition presents questions relating to both the employment (Question 1) and the housing (Questions 2 and 3) provisions of the ordinances.

The employment and housing provisions raise different *certiorari* considerations, but neither merits review at this time. On the employment provisions, the main issue is how this petition should be handled in light of the pendency of *Chamber of Commerce v. Whiting*, No. 09-115, which is a preemption challenge to Arizona's immigrant employment regulations. This case and *Whiting* both involve express and conflict preemption claims. The express preemption claim and some of the conflict preemption claims here are similar to those in *Whiting*. But there are also conflict preemption issues raised in this case that are distinct from those in *Whiting* and were

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[1] The court of appeals vacated the injunction with respect to one distinct employment-related provision on standing grounds. That issue is not before this Court.

correctly decided below. Therefore, the Court can and should deny review of the employment provisions now.

The housing provisions plainly do not warrant the Court's review. Courts have unanimously rejected attempts to enact restrictive immigrant housing regulations like Hazleton's. Moreover, this case does not involve any conflict regarding the proper interpretation of the federal criminal harboring statute, 8 U.S.C. § 1324(a)(1), and is not an appropriate vehicle for resolving any genuine questions that may exist as to that statute's scope.

STATEMENT OF THE CASE

1. In 2006, Hazleton enacted two municipal ordinances that regulate employment and housing based on immigration status: the Illegal Immigration Relief Act Ordinance ("IIRAO"),[2] Pet. App. 350, and the Rental Registration Ordinance ("RO"), *id.* at 369.

Both ordinances were enacted in response to an increase in Hazleton's population since 2000, much of which was due to Latino families who had moved to Hazleton from New York and New Jersey. *Id.* at 4. Believing that many of these newcomers were non-citizens who lacked lawful immigration status, and having concluded "that the federal

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[2] Hazleton amended the IIRAO on numerous occasions in the course of the litigation, including during the trial. Pet. App. 6 n.2. Both the district court and court of appeals rulings are based on the current iteration of the ordinance.

government could not be relied upon to prevent such aliens from moving into the City, or to remove them," *id.* at 5-6, Hazleton took matters into its own hands.[3]

Hazleton's employment provisions are found in the IIRAO. The ordinance is written broadly to prohibit anyone from knowingly engaging, directing, or permitting an unauthorized worker to perform any act or task for which the worker expects or is provided compensation. IIRAO § 4.A. Any resident or municipal employee may file a complaint with the City alleging a worker is unauthorized. *Id.* § 4.B(1). The Hazleton Code Enforcement Office must then demand that the employer produce identification documents for the worker. *Id.* § 4.B(3).

If the employer fails to produce the documents within three days or the Code Enforcement Office confirms that a worker lacks authorization to work in the United States, Hazleton suspends the employer's business license, forcing closure of the entire business. *Id.* § 4.B(3)-(4). For a first offense, the closure terminates one business day after the employer submits an affidavit stating that the violation has ended and providing certain other information. *Id.* § 4.B(6). For a subsequent offense, the closure lasts a minimum of twenty days. *Id.* § 4.B(7).

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[3] The trial included extensive testimony from both sides about the extent and effects of unauthorized immigration in Hazleton. The district court made no factual findings based on this testimony and the Court of Appeals carefully sidestepped the "hotly contest[ed]" issue. Pet. App. 7 n.3.

The federal E-Verify system plays an important role in Hazleton's employment scheme. E-Verify, which was previously known as "Basic Pilot," is a voluntary, temporary and experimental federal electronic employment verification system. Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA"), Pub. L. No. 104-208, Div. C., § 402(a), 110 Stat. 3009.[4] The IIRAO requires employers to use E-Verify if they have employed more than one unauthorized worker. IIRAO § 4.B(6)(b). It provides a safe harbor from its penalties for employers who use E-Verify. *Id.* § 4.B(5). The ordinance also requires employers who seek significant City contracts and grants to use E-Verify. *Id.* § 4.D.

Hazleton's housing provisions are contained in both the IIRAO and the RO. The IIRAO makes it illegal to "harbor" an "illegal alien." As defined by Hazleton, harboring means to knowingly "let, lease or rent a dwelling unit to" or "suffer or permit the occupancy of the dwelling unit by" an "alien who is not lawfully present in the United States." *Id.* §§ 5.A(1), 3.D. An alien who is not "lawfully present" and enters into a lease is "deemed to have breached a condition of the lease." *Id.* § 7.B

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[4] As the court of appeals recognized, "E-Verify also has significant problems" that explain Congress' choice to keep it voluntary and temporary, rather than mandatory. Pet. App. 101; *see also id.* at 98-100; C.A. App. A1510-24 (expert testimony regarding problems with E-Verify system).

The IIRAO's enforcement provisions for housing are similar to those for employment. Any resident or City employee may file a complaint, which triggers an investigation. *Id.* § 5.B(1). If the landlord (or other suspected violator) either fails to produce documentation regarding the resident who is the subject of the complaint, or the resident is determined to be "not lawfully present," the landlord must evict the resident or lose her rental license. *Id.* § 5.B(3)-(4).

The IIRAO's housing provisions are supplemented by the RO, which requires any prospective tenant age eighteen or over to apply for and receive an occupancy permit from the City. RO § 6.a–b. A tenant must submit certain documents to receive a permit, including "proper identification showing proof of legal citizenship and/or residency." *Id.* § 7.b.1. Any landlord or tenant who allows a person without an occupancy permit to stay in a dwelling is subject to at least a $1,000 fine. *Id.* § 10.b.

2. A group of business entities, landlords, tenants and nonprofit Latino organizations filed suit in the district court claiming that the IIRAO and RO violate the Supremacy Clause and other federal constitutional and statutory provisions, as well as Pennsylvania state law. Pet. App. 16. The district court granted Plaintiffs a temporary restraining order enjoining the ordinances' enforcement. *Id.* After a four month discovery period, *id.* at 164, the court conducted a nine day bench trial, *id.* at 16, that

featured testimony by the plaintiffs, various Hazleton officials and a half-dozen expert witnesses.

In July 2007, the district court issued a 206-page decision permanently enjoining the IIRAO and RO on multiple grounds. *Id.* at 159-388. The court found that the employment and the housing provisions are both preempted and thus invalid.

On the employment provisions, the court first explained that Hazleton's scheme is expressly prohibited by 8 U.S.C. § 1324a(h)(2), a provision of the Immigration Reform and Control Act of 1986 ("IRCA"), Pub. L. No. 99-603, 100 Stat. 3359, that "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." The district court rejected Hazleton's argument that the IIRAO's employment provisions constitute a "licensing or similar law[]" within § 1324a(h)(2)'s parenthetical savings clause, describing it as "counterintuitive to the plain language of the provision" because "[i]t would not make sense for Congress . . . to allow states and municipalities the opportunity to provide the ultimate sanction, but no lesser penalty." Pet. App. 246. The court explained that its conclusion is supported by the legislative history of § 1324a(h)(2), which demonstrates that the parenthetical exception applies to "fitness to do business laws" and sanctions predicated on a federal finding that an employer has knowingly hired an unauthorized worker. *Id.* at 246-48.

The district court additionally and independently found that the employment provisions are impliedly preempted by federal law under both field and conflict preemption theories. The court found that the federal government had occupied the field of unauthorized alien employment regulation to the exclusion of IIRAO's employment provisions. *Id.* at 250-60. The district court also identified multiple conflicts between the Hazleton law and the federal employer sanctions scheme enacted in IRCA. These include Hazleton's imposition of employment verification via its Code Enforcement Office, in contrast to the federal processes prescribed by IRCA; the fact that Hazleton's scheme encompasses workers, such as independent contractors and casual domestic workers, specifically excepted from verification under federal law; Hazleton's requirement that certain employers participate in E-Verify; and the different balances that the two schemes strike between protecting "the rights of businesses and workers" and "preventing illegal employment." *Id.* at 261-70.

Finally, the district court found that the housing provisions of the IIRAO and RO also conflict with federal law and are therefore preempted. *Id.* at 273-79. Explaining that both ordinances are premised on incorrect assumptions about the operation of federal immigration law, the district court held that the ordinances impermissibly "prohibit[] [aliens] from residing in the city although they may be permitted to remain in the United States." *Id.* at 278-79.

3. In September 2010, a unanimous Third Circuit panel issued a lengthy opinion affirming the district court's judgment.[5]

a. Like the district court, the court of appeals found that the employment provisions are conflict preempted because they "stand as an obstacle to the accomplishment and execution of federal law." Pet. App. 88. The court of appeals identified "at least" four sets of conflicts, *id.* at 92, which significantly disrupt the federal employer sanctions scheme established by IRCA.

First, the court of appeals found that the IIRAO establishes a separate and independent local adjudicative system for determining whether an employer has hired unauthorized aliens. *Id.* Hazleton's system conflicts with federal law because it deprives employers of the procedures and protections available to them under IRCA. *Id.* at 92-94. Moreover, "the fact that Hazleton has established an alternative system *at all*" burdens employers by subjecting them to "two separate systems . . . ." *Id.* at 94 (emphasis in original). Congress did not intend to subject employers to a "patchwork of state and local systems each independently monitoring, investigating, and ultimately deciding—all concurrently with the

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[5] The court of appeals rejected Hazleton's challenges to plaintiffs' standing, except as to a distinct provision in the IIRAO establishing a private cause of action. Pet. App. 18-49. *See supra* n.1.

federal government—whether employers have hired unauthorized aliens." *Id.* at 95.

Second, the court of appeals recognized that Hazleton's employment provisions alter the employment verification scheme that is the linchpin of IRCA—commonly referred to as the "I-9 process"—in two ways. *Id.* at 96-97. They eliminate the safe harbor provided by federal law for employers who comply in good faith with the I-9 process. *Id.* at 96. Further, they coerce or, in some cases, mandate employers to participate in the federal E-Verify system, which Congress intended to "remain fully voluntary for the vast majority of employers . . . ." *Id.* at 97.

Third, the court of appeals found that IIRAO expands employers' verification obligations to encompass independent contractors, "even though Congress purposely excluded independent contractors from IRCA's verification requirements." *Id.* at 101-04.

Fourth, the court of appeals found that the IIRAO's failure to provide offsetting anti-discrimination protections for work-authorized aliens "place[s] all of its weight on one side of the regulatory scale," drastically upsetting the balance that Congress carefully struck in IRCA. *Id.* at 104-09.

The court of appeals did not find the employment provisions expressly preempted. On that issue, the court of appeals departed from the district court's analysis, instead adopting a broader

reading of § 1324a(h)(2)'s parenthetical savings clause for "licensing and similar laws" that would encompass Hazleton's employment provisions if those provisions were viewed in isolation. *Id.* at 79-84. The court of appeals also noted, however, the "significant force" of the argument that the IIRAO is "not a bona fide licensing law," but instead "should be viewed as part of a scheme intended to regulate immigration by keeping all persons lacking lawful immigration status out of the City, and by supplanting the federal government's role in these matters." *Id.* at 84 n.31. The court noted that the record contained evidence to support that "very troubling" theory, but ultimately declined to resolve the question, given its holding that the employment provisions are conflict preempted. *Id.*

b. The court of appeals next found that the housing provisions violate the Supremacy Clause under all three tests set forth by this Court in *De Canas v. Bica*, 424 U.S. 351 (1976). First, the court explained that the housing provisions "attempt[] to regulate residence based solely on immigration status." Pet. App. 111. Thus, they impermissibly "regulate immigration," a power reserved exclusively to the federal government under the Constitution. *Id.* Second, the housing provisions are field preempted because "'the comprehensiveness of the [Immigration and Nationality Act's] scheme for regulation of immigration and naturalization' . . . plainly precludes state efforts, whether harmonious or conflicting, to regulate residence in this country based on immigration status." *Id.* at 112 (quoting *De*

Canas, 424 U.S. at 359). Third, the housing provisions are conflict preempted because they "attempt to effectively 'remove' persons from Hazleton based on a snapshot of their current immigration status, rather than based on a federal order of removal." *Id.* at 114. The court explained that under federal law, "unlawful immigration status does not lead instantly, or inevitably, to removal," for a number of reasons including the availability of relief from removal in federal immigration proceedings. *Id.* at 115-17.

REASONS TO DENY THE PETITION

I. *Certiorari* on the Employment Provisions Can Be Denied Now

A. Hazleton's Scheme Presents Several Fatal Conflicts With Federal Law That Are Not At Issue in *Whiting*

Whatever the outcome in *Chamber of Commerce v. Whiting*, the petition in this case can and should be denied. There is thus no need to hold this petition pending a final decision in *Whiting*.

To be sure, there is significant overlap in the preemption issues raised by Hazleton's employment provisions and those raised by the Arizona law at issue in *Whiting*. In both cases, the express preemption analysis turns on the interpretation of the parenthetical savings clause in 8 U.S.C. § 1324a(h)(2). Moreover, the Arizona and Hazleton laws present some of the same conflicts, such as

depriving employers of the ability guaranteed under federal law to choose whether to participate in E-Verify.[6] Therefore, the Court's decision in *Whiting* could foreclose petitioner's appeal on the employment provisions, and the Court should not even consider granting this petition before deciding *Whiting*.

But the Court need not resolve *Whiting* before *denying* this petition. Hazleton's employment provisions present several additional, significant conflicts with federal law that were correctly decided below and would justify denial of this petition even if the Court were to find that the Arizona law is not preempted, including the following:

1. Hazleton's employment provisions deprive employers of a critical protection provided in IRCA: a defense for good-faith compliance with the I-9 process. *Cf.* Ariz. Rev. Stat. § 23-212(J) (purporting to provide such defense).[7]

IRCA fundamentally changed immigration law by comprehensively regulating—for the first time—the employment of aliens. It imposed penalties on

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[6] The Third Circuit concluded that petitioner had waived any claim that Hazleton's employment provisions (other than the private right of action) were severable, Pet. App. 18-20 & n.13, a holding that petitioner does not challenge here. Thus, a conflict with respect to the E-Verify provisions would void all of the employment provisions at issue.

[7] Whether that defense is actually available to Arizona employers given that federal law explicitly precludes the use of I-9 information for purposes other than enforcement of certain federal statutes, 8 U.S.C. § 1324a(b)(5), is a separate question.

those who employ unauthorized aliens, and established a uniform federal system for verifying work authorization of new hires. As the Third Circuit explained, "Congress went to considerable lengths in enacting IRCA to achieve a careful balance among its competing policy objectives": deterring unauthorized employment, minimizing employer burden, and preventing discrimination. Pet. App. 88 (citing *Chamber of Commerce v. Edmonson*, 594 F.3d 742, 767 (10th Cir. 2010)).

That balance is apparent in IRCA's I-9 process, which established a uniform system for employer verification of the work authorization status of new hires. The I-9 process limits the potential burden on employers by requiring them only to ensure that any relevant document submitted by the employee "reasonably appears on its face to be genuine." 8 U.S.C. § 1324a(b)(1)(A)(ii); *see Collins Foods Int'l, Inc. v. INS*, 948 F.2d 549, 554 (9th Cir. 1991) ("Congress intended to minimize the burden and the risk placed on the employer in the verification process."); Pet. App. 90-91. Employers who can demonstrate good faith compliance with the I-9 process are entitled to an affirmative defense against a charge that they knowingly hired an unauthorized alien. 8 U.S.C. § 1324a(a)(3).

In direct contrast, the IIRAO overrides the I-9 system, disregarding its carefully crafted protections and imposing draconian penalties upon businesses even if they have complied with federal procedures. Under Hazleton's provisions, an employer who

follows federal law by examining a new hire's I-9 documents and determining that they reasonably appear genuine is *not* entitled to a safe harbor, contrary to Congress' intent. Rather, at any point, Hazleton officials or residents may initiate a complaint-driven procedure that requires the employer to provide "identity information" for the challenged employee and subjects the employer to sanctions based on a database query. IIRAO § 4.B(3).

By depriving employers of the safe harbor to which they are entitled under federal law, the IIRAO drastically alters the system of costs and benefits constructed by Congress. The Hazleton ordinance creates a strong incentive for employers to look behind the I-9 documents proffered by workers, to continuously reverify individuals' work authorization status, and to avoid hiring workers that appear to be non-citizens, even if their papers are valid. That is not consistent with the balance Congress carefully struck when it enacted IRCA. *See* S. Rep. No. 99-132, at 8-9 (1985) (describing "imperative" need for a "formal, effective verification system combined with an affirmative defense for those [employees] who in good faith follow the proper procedure," so that employers do not "seek to avoid penalties by avoiding persons they suspect might be illegal aliens").[8]

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[8] Petitioner suggests that conflict preemption does not exist where a local law undermines a balance that Congress carefully struck in a federal statute. Pet. Br. 22-24. That is simply incorrect. *See, e.g., Buckman Co. v. Pls.' Legal Comm.*, 531 U.S.

2. By imposing penalties on employers without a hearing or a finding by a neutral decisionmaker, Hazleton's employment provisions also deny employers procedural safeguards that Congress deemed critical. *Cf.* Ariz. Rev. Stat. § 23-212(D)-(F) (penalties in Arizona scheme imposed by court after adversarial proceeding).

IRCA established a comprehensive process for determining whether an employer knowingly hired an unauthorized worker. Only complaints with a "substantial probability of validity" may be investigated. 8 U.S.C. § 1324a(e)(1)(B). Employers are entitled to notice, a hearing before a federal administrative law judge under federal administrative law procedures, a finding that a knowing violation has occurred based on a preponderance of the evidence, and an opportunity for administrative and federal court appeals. 8 U.S.C. § 1324a(e)(2)-(3), (7)-(8).

341, 348 (2001) (holding that "plaintiffs' state-law . . . claims conflict with, and are therefore impliedly pre-empted by, federal law" because such claims could skew the "balance sought by the Administration"); *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 152 (1989) ("Where it is clear how the [federal] laws strike [a congressional] balance in a particular circumstance, that is not a judgment the States may second-guess."); *see also Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 388 (2000); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 881 (2000); *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987). Petitioner's disagreement with this Court's precedent is not a reason to grant the petition.

Under Hazleton's employment provisions, any superficially valid complaint is investigated, and penalties can be imposed without *any* court proceeding or other hearing. IIRAO §§ 4.B(3), 4.B(4), 7.G. Once penalties are imposed, "[a] business entity that has been 'subject to a complaint and subsequent enforcement' can then seek relief in court, but both the procedure and remedies available . . . are entirely unclear on the face of the ordinance." Pet. App. 94 (quoting IIRAO § 7.F). What is clear, though, is that Hazleton's employment provisions deprive employers of the procedural protections that are essential to the federal scheme. *Id.* at 92-94.

3. Hazleton's employment provisions extend further than federal law by requiring businesses, individuals, non-profits, and other entities to ensure that all of their independent contractors, casual hires, and others that they direct or permit to work are authorized to work in the United States. IIRAO § 4.A. IRCA, however, covers only "hir[ing]" or "recruit[ing] or refer[ring] for a fee, for employment in the United States." 8 U.S.C. § 1324a(a)(1)(A). Federal law does not require that employers verify the immigration status of certain categories of workers, such as independent contractors and casual domestic workers. *See* 8 C.F.R. § 274a.1(c)-(f); *see also* H.R. Rep. 99-682(I), at 57, *reprinted in* 1986 U.S.C.C.A.N. 5649 (stating that "[i]t is not the intent of this Committee that sanctions would apply in the case of casual hires"). IRCA's prohibition also does not apply to entities, such as unions, that refer individuals for employment but without a fee or

profit motive. *Cf.* IIRAO § 3.A (defining "business entity" broadly to include "any person or group of persons performing or engaging in any activity, enterprise, profession, or occupation for gain, benefit, advantage, or livelihood, whether for profit or not for profit," including entities that are not required to obtain business permits).

Hazleton's employment provisions thus encompass activities that Congress chose to exempt. That is not a mere difference between the two schemes, but a conflict that interferes with the attainment of the federal statute's full purposes and objectives. As the court of appeals explained with respect to Congress' exclude to regulate independent contractors from verification: "This was not an unreasoned choice, but part of the crafting of the statute . . . . Compelling businesses to concern themselves with the work authorization status of contractors alters [the relationship between businesses and contractors], and also raises costs." Pet. App. 102-03.

Individually and cumulatively, these conflicts with federal law amply support the decision below and do not require plenary review by this Court.

B. The Flaws That Hazleton's Employer Provisions Share With the Statute in *Whiting* Further Demonstrate Preemption

As we have explained, the court of appeals' holding that IIRAO's employment provisions are

preempted is justified based entirely on provisions in Hazleton's ordinance that are distinct from the Arizona law at issue in *Whiting*. The parts of the employment provisions that do overlap with *Whiting* only reinforce the conclusion that Hazleton's effort to regulate employment based on immigration status is invalid under both conflict and express preemption principles.

1. Hazleton's creation of its own investigatory and adjudicatory scheme to regulate unauthorized employment conflicts with IRCA's creation of a uniform national enforcement scheme. Pet. App. 94-95. Moreover, the prospect that every state and municipality could each create its own independent system to investigate, adjudicate, and punish employers for employing unauthorized workers "could not possibly be in greater conflict with Congress's intent for its carefully crafted prosecution and adjudication system to minimize the burden imposed on employers." *Id.* at 95 (citing *Buckman Co. v. Pls.' Legal Comm.*, 531 U.S. 341, 350 (2001), and *Rowe v. N.H. Motor Transp. Ass'n*, 552 U.S. 364, 373 (2008)); *see also Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 161 (1989) ("prospect of all 50 States" adopting similar scheme supports finding of preemption).

2. Hazleton's attempt to force employers to enroll in E-Verify is incompatible with Congress' explicit decision to give employers the right to "elect" to enter the program, and to terminate their participation if they wish to do so. *See* IIRIRA § 402;

see also Geier v. Am. Honda Motor Co., 529 U.S. 861, 863 (2000) (state requirement preempted where it would "present[] an obstacle to the variety and mix of devices that the federal regulation sought"); *Fid. Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 156 (1982) (state law preempted where it limited the availability of an option that the federal agency considered essential to ensure its ultimate objectives).

3. Additionally, Hazleton's law negates Congress' considered legislative judgment by creating an enforcement-only scheme that contains no countervailing prohibition on discrimination by employers. Pet. App. 103-08; *see also, e.g.*, H.R. Rep. No. 99-1000, at 87 (1986) (Conf. Rep.), *reprinted in* 1986 U.S.C.C.A.N. 5840, 5842 ("The antidiscrimination provisions of this bill are a complement to the sanctions provisions, and must be considered in this context"); H.R. Rep. No. 99-682(I), at 49, 68 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649 (same); H.R. Rep. No. 99-682(II), at 4 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5757, 5761 ("[I]f there is to be sanctions enforcement and liability there must be an equally strong and readily available remedy if resulting employment discrimination occurs."). By "plac[ing] all of its weight on one side of the regulatory scale," Pet. App. 105, Hazleton disrupts the balance Congress struck in IRCA.

4. Although petitioner does not mention express preemption in its Questions Presented,

respondents continue to maintain, as they have throughout this litigation, that the employment provisions also violate IRCA's express preemption provision, 8 U.S.C. § 1324a(h)(2). Like the Arizona law in *Whiting*, Hazleton's employment provisions do not constitute a "licensing or similar law[]" within the meaning of that provision's parenthetical saving clause. The express preemption of the employment provisions thus provides a separate and independent ground for affirming the judgment below.

In sum, Hazleton's employment provisions cannot stand if Arizona's law fails, but *certiorari* can and should be denied in this case regardless of (and without any need to wait for) the outcome in *Whiting*.

II. The Housing Provisions Do Not Warrant Review

A. Courts Have Unanimously Disapproved Hazleton-Type Housing Restrictions

There is no conflict among the circuits—and indeed, no conflict among the courts at any level—regarding the legality of housing restrictions like Hazleton's that would justify *certiorari* on these issues.

Courts across the country have unanimously disapproved of laws modeled on the housing provisions of Hazleton's IIRA and RO. Two district judges in the Northern District of Texas have

separately found such laws invalid. *Villas at Parkside Partners v. City of Farmers Branch*, 701 F. Supp. 2d 835 (N.D. Tex. 2010) (Boyle, J.), *appeal pending*, No. 10-10751 (5th Cir.) ("*Farmers Branch II*"); *Villas at Parkside Partners v. City of Farmers Branch*, 577 F. Supp. 2d 858 (N.D. Tex. 2008) (Lindsay, J.) ("*Farmers Branch I*").[9] A district judge in the Southern District of California temporarily enjoined another Hazleton-type housing ordinance, finding "serious questions" regarding its constitutionality; the municipality then suspended the ordinance and settled the case. *Garrett v. City of Escondido*, 465 F. Supp. 2d 1043 (S.D. Cal. 2006).[10] And a state court in Missouri temporarily enjoined yet another such ordinance; the municipality then repealed that law. *Reynolds v. City of Valley Park*, No. 07 CC-1420, (Mo. Cir. Ct. St. Louis Co., Apr. 5, 2007),

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[9] In *Farmers Branch I*, Judge Lindsay permanently enjoined Farmers Branch Ordinance 2903 because it was an impermissible "regulation of immigration." 577 F. Supp. 2d at 867-76. Farmers Branch then adopted Ordinance 2952, which modified its housing scheme in light of the *Farmers Branch I* decision. *See Farmers Branch II*, 701 F. Supp. 2d at 840-41. In separate litigation against the new measure, Judge Boyle permanently enjoined Ordinance 2952 "both as a 'regulation of immigration' and under the doctrine of implied preemption." *Id.* at 859.

[10] The city of Riverside, New Jersey, similarly repealed its Hazleton-type law after plaintiffs challenged it in state court. *See* Ken Belson and Jill P. Capuzzo, *Towns Rethink Laws Against Illegal Immigrants*, N.Y. Times, Sept. 26, 2007.

http://www.clearinghouse.net/chDocs/public/IM-MO-0001-0022.pdf.[11]

The Third Circuit is the first court of appeals to have addressed this issue, so no conflict among the circuit courts can exist at this point. The issue continues to percolate, with one case currently being briefed in the Fifth Circuit (*Villas at Parkside Partners v. City of Farmers Branch*, No. 10-10751) and another underway in the District of Nebraska (*Keller v. City of Fremont*; *Martinez v. City of Fremont* (Nos. 8:10-cv-270, 4:10-cv-3140) (consolidated)). Should a conflict eventually develop, questions relating to the housing provisions might then be appropriate for this court's review. At present, however, they are singularly unworthy of this Court's consideration.

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[11] Petitioner argues that *Gray v. City of Valley Park*, No. 4:07CV00881 ERW, 2008 WL 294294 (E.D. Mo. Jan. 31, 2008), an unpublished district court decision upholding an *employment* ordinance, suggests that *certiorari* should be granted on its claim that the Third Circuit incorrectly found Hazleton's *housing* provisions preempted. Pet. Br. 29. However, Valley Park repealed its housing ordinance after it was challenged in *Reynolds*, and nothing in *Gray* purports to address or uphold a housing restriction. *See Gray*, 2008 WL 294294, at *5 ("At issue in this lawsuit is only Ordinance No. 1722, the employment provision.").

B. This Case Does Not Present a Circuit Conflict Regarding the Federal Criminal Harboring Statute

Although petitioner attempts to manufacture a circuit split regarding the federal criminal harboring statute, 8 U.S.C. § 1324(a)(1), the decision below does not conflict with any other circuit court's interpretation of that statute. Petitioner contended below that Hazleton's housing provisions "mirror" the federal harboring statute and that such mirroring precludes a finding of preemption under a theory of "concurrent enforcement" authority. Pet. Br. 28-29.[12] The court of appeals disagreed, first explaining that under Third Circuit precedent construing § 1324(a)(1), harboring "requires some act of obstruction that reduces the likelihood the government will discover the alien's presence," and that knowingly renting an apartment to a person lacking recognized immigration status "is not in and

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[12] Petitioner purports to find this authority in scattered circuit court cases discussing the direct enforcement of federal law by state officials—*not* state or local laws that regulate in the same areas as federal law. *See Lynch v. Cannatella*, 810 F.2d 1363, 1371 (5th Cir. 1987); *Gonzales v. City of Peoria*, 722 F.2d 468, 475 (9th Cir. 1983); *Marsh v. United States*, 29 F.2d 172, 174 (2d Cir. 1928). Not only is Hazleton mistaken in characterizing its housing provisions as "concurrent," but its underlying theory is also incorrect. *See, e.g., Crosby*, 530 U.S. at 379-80 ("Conflict is imminent when two separate remedies are brought to bear on the same activity." (punctuation and citation omitted)); *Wisconsin Dept. of Indus. v. Gould Inc.*, 475 U.S. 282, 286-87 (1986) (invalidating state statute that imposed additional sanction on companies that violated federal law).

of itself [such] conduct." Pet. App. 118-19 (citing *United States v. Ozcelik*, 527 F.3d 88, 100 (3d Cir. 2008)).

Critically, the court of appeals went on to explain that, although some

> other Courts of Appeals have held that a showing of concealment is unnecessary . . . , *even under the more lenient tests of these jurisdictions*, we are not aware of any case in which someone has been convicted of 'harboring' merely because s/he rented an apartment to someone s/he knew (or had reason to know) was not legally in the United States.[13]

Thus, while recognizing that the Third Circuit might reach a different conclusion from some other circuits in *some* criminal harboring cases, the court of appeals emphasized that Hazleton's position in this case is not supported by a single analogous case from any circuit.

That remains true today. Petitioner has not cited any case in which knowingly renting an apartment to a person who lacks immigration status, without "much more," Pet. App. 120, resulted in a

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[13] Pet. App. 119-20 (emphasis added) (discussing *United States v. Tipton*, 518 F.3d 591, 595 (8th Cir. 2008); *United States v. Zheng*, 306 F.3d 1080, 1082 (11th Cir. 2002); *United States v. Kim*, 193 F.3d 567, 574-75 (2d Cir. 1999); and *United States v. Sanchez*, 963 F.2d 152, 155 (8th Cir. 1992)).

conviction. To the contrary, all of the cases that Petitioner characterizes as in tension with the court of appeals' holding (most of which are unpublished) involve far more than simple rental. For example, in *United States v. Franco-Beltran*, 229 Fed. Appx. 592 (9th Cir. 2007) (unpublished), the defendant admitted to renting to a known alien smuggler and to "bringing people" herself into the United States. Similarly, the defendant in *United States v. Acosta de Evans* had met the alien in Mexico prior to her entry to the United States and had "discussed with her the difficulty getting immigration papers." 531 F.2d 428, 429 (9th Cir. 1976).[14] In *United States v. Balderas*, 91 Fed. Appx. 354, 355 (5th Cir. 2004) (unpublished), the defendant deployed a "red light [next to his home] that could function as a signal to [unauthorized] aliens" and the facts suggest that defendant's home, far from simply being a rental property typical of a landlord-tenant relationship,

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[14] Moreover, subsequent Ninth Circuit cases that petitioner does not cite clarify that a conviction for harboring requires that defendants intended to violate the law, that is, that defendants acted with *"the purpose of* avoiding [the aliens'] detection by immigration authorities." *United States v. You*, 382 F.3d 958, 966 (9th Cir. 2004) (citing *United States v. Nguyen*, 73 F.3d 887, 894 (9th Cir. 1995)), *cert. denied*, 543 U.S. 1076 (2005). In *Nguyen*, the court explained that "[w]ere we to conclude [that no *mens rea* was required], we would be left with a statute that exposes persons who perform innocent acts to lengthy prison sentences." 73 F.3d at 893. *See also United States v. Castaneda-Melchor*, 387 Fed. Appx. 767, 769 (9th Cir. 2010) (unpublished) (following *You*); *United States v. Torres-Flores*, 502 F.3d 885, 888 (9th Cir. 2007) (same).

served as a link in an ongoing operation intended to conceal the presence of unauthorized aliens.

This case simply does not present a conflict regarding the harboring statute for the Court to resolve.

C. Any Circuit Differences Regarding the Scope of the Harboring Statute Would Be Better Addressed in a Different Case

Having failed to demonstrate that this case squarely presents a conflict regarding § 1324(a)(1), petitioner instead asserts that the Third Circuit would have reached different results from other Circuits in other cases presenting different sets of facts. Pet. Br. 39-41. Even assuming that there were some meaningful disagreement among the Circuits regarding the proper interpretation of § 1324(a)(1), this case is not an appropriate vehicle to resolve it for at least four reasons.

First, the court of appeals' harboring analysis in this case does not actually conflict with any decision of any other court of appeals, as explained above. Second, as also explained above, there is no circuit conflict as to the larger question of the validity of housing restrictions like Hazleton's. Third, the Court can most appropriately address the reach of this federal criminal provision in a case actually arising under the provision. This case implicates the scope of § 1324(a)(1) only obliquely, if at all. In contrast, the specific facts and

circumstances of actual criminal cases would allow the Court to focus its attention on any interpretive issues that genuinely call for this Court's guidance. Fourth, the court of appeals' finding regarding the harboring statute was not necessary to its affirmance of the injunction: The court of appeals correctly found the housing provisions invalid on multiple grounds, many of which would apply even if knowingly renting to a person lacking immigration status amounted to a violation of the federal harboring statute.

D. Hazleton's Housing Provisions Are Preempted

The court of appeals was plainly correct in finding that Hazleton's housing provisions violate the Supremacy Clause on three separate grounds: because they are a regulation of immigration, and therefore encroach on authority the Constitution has entrusted exclusively to the federal government (Pet. App. 111-12); because they are field preempted by the Immigration and Nationality Act ("INA") (*id.* at 112-14); and because they conflict with the INA (*id.* at 114-22).

Petitioner argues primarily that the court of appeals' field-preemption holding is "untenable," without directly addressing either the regulation-of-immigration or the conflict-preemption points. Pet. Br. 27-41. Thus, its attack on the court of appeals' reasoning is at best incomplete and falls far short of

demonstrating that the Court should grant plenary review in order to correct the purported error below.

Even as to field preemption, petitioner's arguments are entirely unpersuasive. Petitioner characterizes the housing provisions at issue as "simply denying illegal aliens rental accommodations in a single city," Pet. Br. 31, but does not actually dispute the court of appeals' conclusions that the housing provisions would exclude many people from residing in Hazleton based on their immigration status, Pet. App. 112-13 & n.37, and would deny residence to individuals who are not ultimately subject to removal from the United States, *id.* at 114-17. Nor does petitioner address the court of appeals' point that "[t]o be meaningful, the federal government's exclusive control over residence in this country must extend to any political subdivision." *Id.* at 113. As the court of appeals explained, the INA comprehensively regulates residence based on immigration status, and Hazleton's housing provisions improperly impinge on that field. *Accord Farmers Branch II*, 701 F. Supp. 2d at 857-59.

Petitioner's claims that the court of appeals' analysis regarding the housing provisions has "far-reaching implications" for other types of state or local laws relating to immigration, Pet. Br. at 32-33, are overwrought. In particular, petitioner's assertion that Third Circuit's housing analysis also extends to employment, *id.*, is self-evidently incorrect: the court of appeals took an entirely different approach to the employment provisions in its decision below. The

housing provisions are different because they directly affect residence and presence. With respect to those provisions, the Third Circuit panel properly refused to "bury [their] heads in the sand ostrich-like ignoring the reality of what these ordinances accomplish," Pet. App. 111, and rejected Hazleton's attempt to usurp the federal government's immigration authority.

CONCLUSION

The Court should deny the petition in its entirety. If the Court chooses to hold the petition pending a decision in *Whiting*, it should distinguish between the issues that relate to the employment (Question 1) and the housing (Questions 2 and 3) provisions of Hazleton's ordinances. The housing provisions do not overlap with *Whiting* and should be denied whenever the Court rules on the petition.

Respectfully submitted,

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